Filed 7/5/19 Steele v. Title365 Co. CA2/4
Received for posting 7/8/19

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GREGORY B. STEELE, Individually and as Trustee etc. et al., Plaintiffs and Appellants, v. TITLE365 COMPANY, Defendant and Respondent.	B290078 (Los Angeles County Super. Ct. No. BC634927)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Leslie Hess, Judge. Reversed and remanded with instructions.

Law Offices of Bruce M. Lorman and Bruce M. Lorman for Plaintiffs and Appellants.

Hall Griffin, Howard D. Hall and Taylor R. Dalton for Defendant and Respondent.

INTRODUCTION

Plaintiffs and appellants Gregory and Linda Steele, individually and as trustees of their trust, sold a residence to defendant Pulze Residential Care Group (Pulze). According to the allegations in plaintiffs' complaints, they financed half of the sale price, with the agreement that if Pulze defaulted, the property would revert to plaintiffs under the deed of trust. Unbeknownst to plaintiffs, Pulze also obtained a loan for the sale from an independent lender. The deed of trust on the other loan was recorded before plaintiffs' deed of trust, and was therefore superior. When Pulze defaulted on both loans, the other lender foreclosed.

Plaintiffs sued Pulze for fraud and related causes of action, and sued multiple other defendants, including respondent Title365 Company, for their involvement in Pulze's alleged scheme. Title365 demurred to plaintiffs' second amended complaint, contending that the causes of action alleged against Title365—conspiracy to commit fraud, aiding and abetting fraud, negligence, and breach of contract—were insufficiently alleged. The trial court sustained the demurrer without leave to amend, and judgment was entered in Title365's favor.

We reverse. The second amended complaint included sufficient facts to state causes of action for conspiracy to commit fraud, aiding and abetting fraud, and breach of contract. Plaintiffs seek leave to amend their negligence cause of action, and we find that the trial court erred in denying plaintiffs leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' allegations

Plaintiffs filed a complaint on September 23, 2016, a first amended complaint (FAC) on December 15, 2016, and a second amended complaint (SAC) on May 31, 2017. The facts alleged in the complaints are somewhat complex, in that they involve allegations of fraud and collusion involving nine different defendants. Here, we focus primarily on the allegations in the SAC involving Title365, which are relevant to the appeal.

Plaintiffs alleged that they owned a residential real property in Burbank and listed it for sale on June 3, 2015, for $1,350,000. On August 23, 2015, plaintiffs agreed to sell the property to Pulze for $1,250,000, and they executed a purchase agreement. Escrow was opened, and Pulze insisted on using defendant Preferred Escrow Services, Inc. as the escrow service and Title365 as the title insurer. The purchase agreement stated that Pulze would pay plaintiffs $625,000 in cash, and execute a promissory note in the amount of $625,000 "as a First Loan secured by a First Deed of Trust to be recorded against the Property." Plaintiffs understood that if Pulze defaulted, they would have "a deed in lieu of foreclosure pursuant to which Plaintiffs could recover title and possession of the Property without the need to proceed with a foreclosure sale." An addendum regarding seller financing, attached to the SAC as an exhibit, states, "If buyer defaults on the note after 60 days the property will be immediately surrendered back to the note holder with out [*sic*] being contested and in lieu of foreclosure. . . ." Plaintiffs alleged that Pulze represented orally and in writing that "the only financing in the transaction was the $625,000 promissory note to be delivered to Plaintiff."

However, Pulze also obtained another loan from defendant Real Value Properties, LLC for $875,000, which was secured with a deed of trust on the property. Plaintiffs attached to the SAC two sets of supplemental instructions by Preferred Escrow Services. The first, initialed by plaintiffs, shows the financing as plaintiffs understood it. The second, initialed by Pulze, shows a deposit of $375,000 and a loan of $875,000. Plaintiffs alleged that the Real Value loan was not disclosed to them in the sale documents. Plaintiffs alleged that they "discovered for the first time after the close of escrow that Defendants Pulze and Real Value Properties had created three separate escrows and separate supplemental escrow instructions, which were intended . . . to defraud Plaintiffs."

Plaintiffs alleged that the Real Value deed of trust was recorded on September 28, 2015, with Title365 named as the trustee. Plaintiffs' deed of trust was recorded on September 29, 2015, and was therefore junior to the Real Value deed of trust. Plaintiffs alleged that the various defendants knew of Pulze's scheme and either directly committed fraud or assisted Pulze in completing the fraud. In addition to Pulze, Title365, and Real Value, plaintiffs named as defendants Dierre Sibley, an individual acting on behalf of Pulze and/or Pulze's alter ego; listing real estate broker Dilbeck Real Estate; Harold Baerresen, who worked for Dilbeck; Shelly Mae Eshelman, whose title is unclear in the SAC, but may have been Pulze's real estate agent; Preferred Escrow Services; and Donna Ramirez, who worked for Preferred Escrow Services.

Plaintiffs alleged that Title365's role in the scheme involved "issuing a Preliminary Title Report to Plaintiffs offering to issue a Title Policy with no mention of the $875,000 Real Value

Deed of Trust. Before the close of escrow, Defendant Title365 knew about the $875,000 Real Value Loan, but failed to amend the Preliminary Title Report or disclose that $875,000 Real Value Loan to Plaintiffs. When the Title Policy was issued, the $875,000 Real Value Deed of Trust was included as an exception to coverage." Neither the preliminary title report nor the title policy was included as an exhibit to the SAC.

Plaintiffs alleged that Pulze never made any payments on the loan from plaintiffs, and in March 2016, Pulze filed for bankruptcy. In October 2016, Real Value, as a foreclosing beneficiary, "caused a Trustee's Deed Upon Sale . . . to be recorded."

The SAC included eighteen causes of action. The second cause of action for intentional misrepresentation was not alleged against Title365, but it is relevant here because plaintiffs alleged that Title365 conspired to commit this act and aided and abetted it. In the intentional misrepresentation cause of action, plaintiffs alleged that various defendants represented to plaintiffs that the only financing in the transaction would be plaintiffs' $625,000 deed of trust, and if Pulze defaulted, plaintiffs would recover the property with the deed of trust in lieu of foreclosure. Plaintiffs described multiple documents, such as the purchase agreement, financing addendum, supplemental escrow instructions, and purchase agreement addendum, which made these representations to plaintiffs. In addition, plaintiffs alleged that there were multiple communications among the defendants and multiple communications by defendants to plaintiffs in support of the scheme. Plaintiffs alleged that the defendants knew their representations were false, knew that plaintiffs would rely on the

false statements, and plaintiffs did rely on them to their detriment.

Plaintiffs asserted four causes of action against Title365, and incorporated the allegations from the intentional misrepresentation cause of action into each of them. The fifth cause of action for conspiracy to commit fraud was alleged against all defendants, including Title365. Plaintiffs alleged that each of the defendants knew of Pulze's scheme and knowingly and willfully conspired among themselves to assist with it. Plaintiffs stated, "Due to the surreptitious conduct of Defendants, . . . Plaintiffs are presently unable to state precisely all of the details of how, when and where each such conspiracy and agreement was entered into." In support of the scheme, Title365 issued a preliminary title report that included no mention of the Real Value loan. However, when Title365 issued its title policy, it excepted the Real Value loan from coverage without providing plaintiffs notice of the change.

In the ninth cause of action for aiding and abetting fraud, plaintiffs alleged that Title 365 "issued a Title Policy which was contrary to the terms and conditions of the Preliminary Title Report which had been offered to and accepted by Plaintiffs." Plaintiffs also alleged that several other defendants aided and abetted Pulze's fraud. They alleged that each of the defendants knew a fraud was being committed, and gave "substantial assistance or encouragement to" Pulze.

In the sixteenth cause of action for negligence, plaintiffs alleged in general terms that Title365 and other defendants had a duty to exercise due care, and breached that duty. In the seventeenth cause of action for breach of contract and breach of the duty of good faith and fair dealing, plaintiffs alleged that

when Title365 issued a preliminary title report, it "offered to issue a Title Policy to Plaintiffs on the terms and conditions of the Preliminary Title Report." The preliminary title report "did not except from coverage the Real Value Loan," and plaintiffs "had the right to expect that the contract thus formed would be consistent with the terms of Defendant Title365's offer contained in the Preliminary Report." "However, the Title Policy purported to except from coverage the Real Value Loan." Plaintiffs alleged that they were damaged in the amount of $625,000 or according to proof, and also requested punitive damages in relation to the fraud-related causes of action.

B. Procedural background

Plaintiffs' complaint was filed on September 23, 2016, and included 13 causes of action. Title365 filed a "notice of entry of appearance" on December 15, 2016. The same day, plaintiffs' FAC was filed; plaintiffs assert that it was filed "voluntarily and as a matter of right." The FAC included 17 causes of action. A stipulation filed on February 8, 2017 and signed by plaintiffs, Title365, and other defendants, stated that plaintiffs had amended the complaint "[i]n response to a foreclosure sale of the real property in issue." The parties stipulated that defendants had until March 31 to respond to the FAC.

Another stipulation was filed on April 26, 2017, which stated that the court had granted the demurrer of defendant Preferred Escrow Services with leave to amend. Defendant Shelly Eshelman had also filed a demurrer and motion to strike, but "to avoid the inconvenience to the Court and the expense of further papers and a hearing on the demurrer and motion to strike," plaintiffs and Eshelman "agreed that Plaintiffs shall file a Second Amended Complaint." The court approved the

stipulation and stated that plaintiffs were to file the SAC on or before May 11, 2017.

On May 2, 2017, Title365 filed an answer to the FAC. On May 11, 2017, the court granted defendant Real Value's demurrer to the FAC; the demurrer is not in the record on appeal. In the court's written order, the court stated, "The demurrer is sustained with 20 days leave to amend. Plaintiff is to [p]lead as if this was the last opportunity to amend."

The SAC was filed on May 31, 2017. It included 18 causes of action, including a new cause of action for breach of contract against Title365.[1]

C. Title365's demurrer

Title365 demurred to the SAC on the basis that the SAC was uncertain and did not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subds. (e) & (f).) Title365 argued that plaintiffs "make no allegations indicating Title365 was involved or aware of the alleged scheme to defraud plaintiffs of their senior position deed of trust." Title365 requested judicial notice of a preliminary title report dated September 29, 2015 (the day after the Real Value deed of trust was recorded), which listed the $875,000 Real Value deed of trust. It argued that "Title365 did disclose Real Value's deed of trust in the preliminary report."

Title365 also argued that the conspiracy to commit fraud claim was not pled with specificity, and the aiding and abetting fraud claim failed to allege that Title365 knew Pulze's actions

---

[1] Certain defendants filed cross-complaints against other defendants, and two cross-complaints listing Title365 as a cross-defendant are included in the record on appeal, as well as Title365's answer to one of those cross-complaints.

were fraudulent. Title365 further asserted that it could not be negligent based on a preliminary title report as a matter of law, and that the breach of contract claim was "improperly asserted against Title365 and contradicted by the title policy."[2]

Plaintiffs opposed the demurrer. They stated that the preliminary title report for which Title365 sought judicial notice was "fabricated," and "is not authentic, was never disclosed or accepted by Plaintiffs, and in fact was purportedly issued after" Real Value's deed of trust was recorded on September 28, 2015. Plaintiffs stated that the preliminary title report central to their allegations was dated August 31, 2015, and they attached it to a declaration filed with their opposition. Plaintiffs stated, "If the Court is inclined to accept any of the Title Company's arguments upon demurrer, Plaintiffs request leave to amend to include that August 31 Preliminary Title Report as an Exhibit to an amended Complaint." Plaintiffs' counsel also stated in a declaration that "Plaintiffs can easily amend the SAC by attaching the Preliminary Title Report and incorporating its terms into the pleading. Plaintiffs request leave to amend the SAC to include this Preliminary Title Report." Plaintiffs also argued in their opposition that each of the four causes of action against Title365 had been properly alleged.

In its reply, Title365 stated, "This Court made abundantly clear plaintiffs would not be given any further opportunities to amend. The improper attempt to amend the complaint for a third time does nothing to save plaintiffs' claims." Title365 also asserted that plaintiffs improperly attempted "to present evidence and allegations outside of the four corners of the SAC,

---

[2] Title365 pointed out that the title insurance policy was underwritten by Westcor Land Title Insurance Company.

which is improper." Title365 reiterated its contentions that the allegations in the SAC were insufficient to state viable claims against it.

There is no reporter's transcript in the record on appeal. The court sustained Title365's demurrer with a written ruling. The court denied Title365's request for judicial notice of the preliminary title report dated September 29, 2015. Regarding the fifth cause of action for conspiracy to commit fraud, the court reiterated plaintiffs' allegations and stated, "This is wholly insufficient for pleading either fraud [citations], or conspiracy [citations], or conspiracy to commit fraud." The court noted that plaintiffs alleged they did not know the exact manner in which the fraud was perpetuated, and said, "the facts not pleaded appear to the court to undercut the only articulated . . . wrongdoing. The court therefore sees no basis for further amendment." The court therefore sustained the demurrer without leave to amend.

Regarding the ninth cause of action for aiding and abetting fraud, the court stated, "This cause of action fails because it does not plead sufficient facts with particularity to show that Title 365 knew the conduct of the other defendants was fraudulent." The court continued, "[T]o the extent plaintiffs rely on the . . . Preliminary Title Report as what they had been offered and had accepted, . . .they ignore encumbrances recorded after that date. The demurrer is sustained without leave to amend."

Regarding the sixteenth cause of action for negligence, the court stated that "Insurance Code § 12340.11 establishes that a title insurer is not liable for negligence in connection with a preliminary report, and the recipient of the report cannot rely on

it to represent the status of title to the property to be insured."[3] Again, the court sustained the demurrer without leave to amend.

As to the seventeenth cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing, the court stated that the claim appeared to be based on the preliminary title report, but "plaintiffs have neither set out its terms verbatim, nor have they alleged their legal effect, nor have they attached a copy to the pleading." The court continued, "In addition, this appears to be a new claim, not present in the First Amended Complaint, which was added without the court's permission. The demurrer to this claim is also sustained without leave to amend."

The court entered judgment in favor of Title365. Plaintiffs timely appealed.

DISCUSSION

On appeal, plaintiffs contend that the trial court erred in sustaining the demurrer, and even if the demurrer were warranted, that the court erred in denying leave to amend. "A

---

[3] Insurance Code section 12340.11 states in full, "'Preliminary report', 'commitment', or 'binder' are reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein. The reports are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report shall not be construed as, nor constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted."

demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. [Citation.] When a demurrer is sustained without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.' [Citation.] Plaintiff has the burden to show a reasonable possibility the complaint can be amended to state a cause of action." (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1608-1609 [fn. omitted].)

A. Lack of a reporter's transcript

As a preliminary matter, we address Title365's assertion that because plaintiffs did not submit a reporter's transcript on appeal, "this Court need not even reach the merits and should affirm the Trial Court's Judgment in favor of Title365." We reject this contention, because a hearing transcript is not critical to the issues to be determined on appeal.

Title365 cites *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, in which the plaintiff appealed following a three-day trial. The plaintiff's contentions of error relied on the evidence purportedly presented at trial. The Court of Appeal stated, "The fatal problem with this appeal is that Foust fails to provide us with a reporter's transcript from his court trial or any other adequate statement of the evidence." (*Id.* at p. 186.) The court noted "the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct

and prejudicial error must be affirmatively shown." (*Id*. at p. 187.) Without a record demonstrating what evidence was presented to the trial court, the plaintiff could not establish that the trial court erred. (*Ibid*.)

Foust cited *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, which Title365 also cites, an appeal from a demurrer in which the lack of a record was fatal to the plaintiff's appeal. There, the defendant did not file a written demurrer and the plaintiff claimed defendants made a "speaking demurrer" that involved inappropriate evidentiary matter. (*Id*. at p. 711.) The Court of Appeal stated, "Without a transcript of the hearing on the demurrer, we have no idea what grounds were actually advanced or what arguments were made in the trial court in support of or in opposition to the demurrer." (*Ibid*.) The court continued, "It is plaintiff's burden to affirmatively show error. He has not met this burden." (*Id*. at p. 712.)

This case does not present a similar factual scenario. The record on appeal contains all of the documents relevant to the appeal, including the SAC, demurrer, opposition, reply, and the court's written order. Neither plaintiffs nor Title365 assert that relevant events occurred at the unrecorded hearing. Thus, the lack of a reporter's transcript is not fatal to plaintiffs' appeal. We therefore turn to the merits.

B. Cause of action for conspiracy to commit fraud

In sustaining the demurrer to the fifth cause of action for conspiracy to commit fraud, the court held that the "allegations against the other defendants are not factually connected to any acts or omissions by Title 365." The court also noted plaintiffs' statement in the SAC that they did not know all of the details of the conspiracy, and stated, "The court therefore sees no basis for

further amendment." Plaintiffs assert that their allegations were sufficient to withstand the demurrer.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511 (*Applied Equipment*).) "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." (*Id.* at p. 511.) "'Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action.'" (*Ibid.*)

To adequately plead a claim for civil conspiracy, plaintiffs must plead facts to support three elements: "(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581.) "Where fraud is alleged to be the object of the conspiracy, the claim must be pleaded with particularity." (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136.) "'The elements of fraud . . . are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.'" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

Here, plaintiffs alleged formation of a conspiracy in the SAC by stating that the defendants "knowingly and willfully conspired and agreed among themselves" to defraud plaintiffs.

They alleged that Pulze insisted on using Title365 as the title insurance company, and that each of the defendants knew Pulze "intended to record a deed of trust in the amount of $875,000 superior to Plaintiffs['] Deed of Trust and to obtain cash proceeds in connection with the purchase of the Property without the disclosure in good faith of these facts to Plaintiffs." Plaintiffs alleged that defendants knew of Pulze's plan, and intended that it proceed "without the knowledge of Plaintiffs."

Plaintiffs alleged wrongful conduct in furtherance of the conspiracy by contending that Title365 did not disclose the Real Value deed of trust or loan in the preliminary title report, and "[b]efore the close of escrow, Defendant Title365 knew about the $875,000 Real Value Loan, but failed to amend the Preliminary Title Report." Plaintiffs also alleged wrongful conduct by other defendants. Plaintiffs alleged in general terms that they were damaged by the conspiracy "according to proof." Elsewhere in the SAC, including in paragraphs incorporated into the conspiracy cause of action, plaintiffs alleged that they were damaged "in the amount of at least $625,000." Facts to support a conspiracy were therefore alleged.

Title365 asserts that the allegations are insufficient because plaintiffs "fail to specifically allege the elements of fraud." They assert that "[i]t is not clear why the Steeles believe Title365 knew of the Real Value deed before it was recorded", and that plaintiffs "also fail to provide the name of the person involved in the fraud, their authority to speak, and to whom they spoke." However, to state a claim for *conspiracy* to commit fraud, plaintiffs need not allege facts to support an independent fraud cause of action against each actor. As noted above, a conspiracy claim imposes liability on persons who did not actually commit

the tort. (*Applied Equipment, supra,* 7 Cal.4th at pp. 510-511.) "[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.)

Title365 does not mention plaintiffs' second cause of action for intentional misrepresentation asserted against other defendants. In that cause of action, plaintiffs alleged that Pulze and others represented that plaintiffs' financing to Pulze was the only financing in the transaction, plaintiffs would recover title if Pulze defaulted on the loan, and plaintiffs would be provided with an insured first deed of trust. Plaintiffs included allegations about specific representations, such as multiple oral representations among various defendants, the purchase agreement, the financing addendum, supplemental escrow instructions, and a purchase agreement addendum, Plaintiffs alleged that defendants knew these written and oral representations were false, knew that Pulze was planning to also get the Real Value loan, and "intended to deceive Plaintiffs concerning the acquisition, amount and effect of such financing." Defendants' representations were made "with the intent to defraud Plaintiffs" and "were made for the purpose of inducing Plaintiffs to rely upon them and with the intent that Plaintiffs enter into the Purchase Agreement and sell the Property to Defendant Pulze." Plaintiffs acted "[i]n reasonable reliance on said oral and written representations," and were damaged in an amount that "exceeds $625,000."

The second cause of action therefore alleges each element of fraud. The fifth cause of action for conspiracy incorporated all earlier paragraphs, including those from the intentional misrepresentation cause of action, and also adequately alleged a conspiracy. No more was required.

Title365 also argues that plaintiffs admit that they do not have sufficient facts to allege a conspiracy, pointing to plaintiffs' statement in the SAC that "[d]ue to the surreptitious conduct of Defendants, . . . Plaintiffs are presently unable to state precisely all the details" of the conspiracy. However, "[l]ess specificity should be required of fraud claims 'when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy."'" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384 (*Alfaro*).) Moreover, "conspirators rarely make such agreements in the open or document their illicit agreements. Rather, it is usually the situation that such agreements are made covertly, thereby making it difficult for a plaintiff to allege the full details of . . . [an] agreement prior to its ability to engage in the 'rock-turning' allowed by discovery." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1239 [discussing price-fixing agreements].) Here, plaintiffs' inability to allege all the details of an alleged conspiracy before discovery is not fatal to their conspiracy cause of action in the context of a demurrer. The trial court therefore erred in sustaining the demurrer to plaintiffs' cause of action for conspiracy to commit fraud.

C. Aiding and abetting fraud

In its order sustaining Title365's demurrer to the ninth cause of action for aiding and abetting fraud, the trial court said

plaintiffs failed to sufficiently allege that Title365 knew the conduct of the other defendants was fraudulent, plaintiffs alleged only legal conclusions, and plaintiffs "ignore encumbrances recorded after" the date of the preliminary title report. On appeal, plaintiffs assert that the cause of action was adequately alleged. Title365 contends the SAC failed to allege that Title 365 had knowledge of or encouraged fraud.

"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.) "[C]ivil liability for aiding and abetting the commission of a tort . . . differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] "'[A]iding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct . . . . [I]t necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.'"" (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823, fn. 10.)

In the aiding and abetting cause of action, plaintiffs incorporated the earlier paragraphs of the SAC, including the cause of action for fraud and the allegation that Pulze insisted that Title365 be used as the title insurance company. Plaintiffs alleged that "each of the Defendants had knowledge that a fraud was being committed by Defendant Pulze against Plaintiffs."

They asserted that "[e]ach of the Defendants gave substantial assistance or encouragement to Defendant Pulze," including Title365, which "issued a Title Policy which was contrary to the terms and conditions of the Preliminary Title Report which had been offered to and accepted by Plaintiffs." Plaintiffs also alleged that each defendant's conduct caused them harm.

Title365 asserts that the conclusory allegation that defendants knew about Pulze's fraud is insufficient to establish this cause of action. It notes that "[m]ere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326 (*Fiol*).)

Title365 is correct as to the law, but plaintiffs did not allege a mere failure to prevent the fraud. Instead, plaintiffs alleged that each of the non-Pulze defendants, including Title365, "gave substantial assistance or encouragement" to Pulze. Plaintiffs specified Title365's actions in issuing the title policy that differed from the preliminary title report.

The trial court and Title365 both relied on *Fiol, supra*, 50 Cal.App.4th 1318, but that case is not instructive. There, the court held that "a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA), as either an aider and abettor of the harasser or the employer, or as an agent of the employer." (*Id*. at p. 1322.) The employee plaintiff sued his employer, his non-harassing supervisor, and the harasser under the FEHA; the Court of Appeal noted that the employee's action against the supervisor, which included an aiding and abetting cause of action, was based

solely on the supervisor's failure to investigate or restrain the harasser. (*Id*. at pp. 1322-1323.)

The trial court granted the supervisor's motion for judgment on the pleadings, and the Court of Appeal affirmed. As to the aiding and abetting cause of action, the court stated, "We are aware of no authority for the proposition that a supervisory employee is personally liable, as an aider and abettor of the wrongdoer, to a subordinate for failing to prevent the misconduct of another subordinate. In the first place, mere failure to act does not constitute the giving of 'substantial assistance or encouragement' to the tortfeasor. Moreover, a supervisory employee owes no duty to his or her subordinates to prevent sexual harassment in the workplace. That is a duty owed only by the employer. [Citations.] We conclude a supervisory employee is not personally liable under the FEHA, as an aider and abettor of the harasser, for failing to take action to prevent the sexual harassment of a subordinate employee." (*Fiol, supra*, 50 Cal.App.4th at p. 1326.) The court also held that "[a]n employee cannot aid and abet his or her corporate employer. [Citation.] A corporation can act only through its employees; thus, an employee acting on behalf of the employer cannot be acting in concert with the employer, as there is in law only a single actor." (*Ibid*.)

Fiol does not set forth general pleading standards for aiding and abetting causes of action. In addition, *Fiol* is factually dissimilar to this case, in that plaintiffs' aiding and abetting theory here does not rest on the existence of an employment relationship. Moreover, plaintiffs here have not alleged that Title365 failed to stop Pulze's fraud; they alleged that Title365 actively participated in it. Thus, we are not persuaded by

Title365's assertion that *Fiol* supports the trial court's ruling sustaining the demurrer.

The trial court also stated that plaintiffs did not "plead sufficient facts with particularity" to show that Title365 knew of the fraud, and Title365 repeats this assertion. However, the SAC, as a whole, includes sufficient facts as to the fraud allegedly perpetrated by Pulze and Title365's alleged support of it. By alleging that Title365 knew of the fraud, and assisted the scheme by issuing a title insurance policy that did not match the preliminary title report, plaintiffs have adequately alleged facts regarding Title365's knowledge.[4] Moreover, Title365 has not cited any authorities supporting its contention that an aiding and abetting cause of action must be pled with particularity. To the extent the underlying fraud must be alleged with particularity, we have found that it was sufficient.

The trial court therefore erred in sustaining the demurrer to plaintiffs' cause of action for aiding and abetting fraud.

D. Negligence

The negligence cause of action in the SAC is alleged in the most general terms, asserting that all defendants, including Title365, were obligated to exercise reasonable care, they breached that duty, and caused plaintiffs harm. The trial court sustained Title365's demurrer to this cause of action on the basis

---

[4] The trial court also said that plaintiffs "ignore encumbrances recorded after" the date of the preliminary title report. Title365 repeats this in its respondent's brief, with no explanation as to how it might support the demurrer. We are unclear as to the reasoning for these statements, given that Real Value's encumbrance recorded after the date of the preliminary title report form is a central issue in plaintiffs' allegations.

that "Insurance Code § 12340.11 establishes that a title insurer is not liable for negligence in connection with a preliminary report."

On appeal, plaintiffs assert that Title365 "offered to insure a First Deed of Trust in [plaintiffs'] favor, and then recorded a different First Deed of Trust, with [Title365] as the Trustee, without ever disclosing that conduct" to plaintiffs. Plaintiffs acknowledge this "theory arguably could have been alleged more clearly in the SAC," and assert that the trial court abused its discretion by denying them leave to amend. Title365 asserts that the trial court was correct, and "a title insurer is not liable for negligence in connection with a preliminary report, and the recipient cannot rely on it to represent the status of title to the property to be insured."

Although this is a correct statement of the law, it is not applicable here. Insurance Code section 12340.11 makes clear that preliminary title reports "are not abstracts of title," and "shall not be construed as, nor constitute, a representation as to the condition of title to real property." (Ins. Code, § 12340.11.) "The intent of [this statute] is to relieve title insurers from liability as title abstractors for the negligent preparation of preliminary title reports." (*Alfaro, supra,* 171 Cal.App.4th at p. 1389.) Thus, if plaintiffs had asserted that the preliminary title report misrepresented the title of the property and plaintiffs relied on it to their detriment, Insurance Code section 12340.11 would bar their claim.

However, plaintiffs' allegation is not that the preliminary title report was inadequate as an abstract of title. Instead, plaintiffs alleged that they relied on the preliminary title report as an *offer* to issue a lender's title insurance policy insuring plaintiffs' first deed of trust. Plaintiffs alleged that they accepted

the offer, but Title365 issued a policy that did not comply with the offer, because the policy excepted Real Value's superior deed of trust without informing plaintiffs of the change. Insurance Code section 12340.11 does not bar such a claim. To the contrary, section 12340.11 expressly recognizes that preliminary title reports are "reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein." (Ins. Code, § 12340.11.)

"Title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs." (*Lawrence v. Chicago Title Ins. Co*. (1987) 192 Cal.App.3d 70, 74.) "'[T]he insurer does not represent expressly or impliedly that the title is as set forth in the policy; it merely agrees that, and the insured only expects that, the insurer will pay for any losses resulting from, or he will cause the removal of, a cloud on the insured's title within the policy provisions.'" (*Id*. at p. 75.) "Accordingly, when the contingency insured against under the policy occurs, the title insurer is not, by that fact alone, liable to the insured for damages in contract or tort, but rather, is obligated to indemnify the insured under the terms of the policy." (*Ibid.*) A preliminary title report "shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted." (Ins. Code, § 12340.11; see also *Alfaro, supra,* 171 Cal.App.4th 1356, 1389 [preliminary title reports "serve to apprise the prospective insured of the state

of title against which the insurer is willing to issue a title insurance policy."].)

Both parties cite *Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583 (*Lee*) in support of their arguments. In *Lee*, the plaintiffs owned a parcel of land in Solano County. When they purchased the property in 1990, they understood that they were purchasing two parcels, identified in the opinion as APN 9 and APN 22. (*Lee, supra*, 188 Cal.App.4th at p. 588.) The defendant title insurance company issued a preliminary title report offering to insure APN 9 and APN 22. (*Ibid.*) The title policy was paid for and issued. (*Id.* at p. 589.) When the plaintiffs decided to sell the property in 2006, a dispute arose as to whether the plaintiffs or their neighbors owned APN 22. (*Id.* at p. 591.) The plaintiffs requested that defendant clear the title. (*Ibid.*) Investigations determined that parcel APN 22 had been within the limits of the neighbor's land since 1978. (*Ibid.*)

The defendant title company denied the plaintiffs' claim under the policy. The plaintiffs sued for declaratory relief, breach of insurance contract, bad faith breach of insurance contract, and escrow negligence. (*Lee, supra*, 188 Cal.App.4th at p. 593.) The trial court granted the title company's motion for summary judgment, stating, "'[P]laintiffs cannot recover for a breach of title insurance policy as to land they never purchased, never owned and never insured.'" (*Id.* at p. 594.)

On appeal, the plaintiffs asserted that "their ownership of the disputed parcel, APN 22, has no bearing on whether the title policy covered that parcel. If the policy covers the parcel, and, if, as the evidence shows, the [neighbors] and not plaintiffs own APN 22, then defendant is obligated under the terms of the policy to indemnify plaintiffs for any loss they have suffered because

'[t]itle to the estate or interest [is] vested other than [in plaintiffs].'" (*Ibid.*, fn omitted.) The Court of Appeal agreed and reversed the summary judgment.

The Court of Appeal stated, as the trial court did here, that under Insurance Code section 12340.11, the recipient of a preliminary title report may not rely on it to represent the status of the title. (*Lee, supra,* 188 Cal.App.4th at p. at p. 594.) However, that was not the basis of the plaintiffs' allegation. Instead, the plaintiffs asserted that the title insurer had agreed to insure the title to APN 22. The court held that "the insured can rely on a preliminary report *to reflect the scope of the coverage being offered*." (*Id.* at p. 596 [emphasis added].) The court explained, "[T]he preliminary report in this case can be reasonably construed as an offer to insure APN 22. The report included APN 22 in the property's address, listed exclusions from coverage that were specific to APN 22, and attached an assessor's parcel map with an arrow pointing to the number 22. Plaintiffs could have reasonably expected, under the circumstances, that they were buying a title insurance policy on APN 22 that would conform to the preliminary report." (*Lee, supra*, 188 Cal.App.4th at pp. 594-595.) The court also noted that a "preliminary report is an offer identifying . . . '"precisely the risk which [the insurer] will agree to assume'" [citation], which the insured accepts by buying the title policy, and the insured has the right to expect that the contract thus formed will be consistent with the terms of the offer. [Citation.] . . . . The buyer generally sees only the preliminary report before closing and would necessarily expect that the subsequently delivered policy of title insurance would conform to the preliminary report absent contrary escrow instructions." (*Lee, supra,* 188 Cal.App.4th at p. 597.)

Similarly here, plaintiffs have not alleged that the preliminary title report failed to accurately reflect the property's title. Instead, plaintiffs have alleged that Title365's preliminary title report offered to insure plaintiffs' first deed of trust without exception for other deeds of trust, and then failed to issue a title insurance policy with the same terms and conditions. This claim is not barred by Insurance Code section 12340.11, and the trial court erred in holding that it was.

Nonetheless, the allegations in the negligence cause of action were vague and nonspecific, and plaintiffs now seek leave to amend to clarify this claim. They contend that the trial court erred in denying leave to amend below. We agree that amendment is warranted. The negligence cause of action is vague as to the nature of Title365's duty and how it breached that duty. Plaintiffs stated in their opposition to the demurrer that Title365 had a "duty of due care to cause to be issued a Title Policy consistent with its promises in the Preliminary Title Report," and that it breached that duty by issuing a different policy. Plaintiffs requested leave to amend if the court agreed with Title365 that the allegations were inadequate.

The trial court gave no reason for denying leave to amend the negligence cause of action specifically. However, it stated at the beginning of its written opinion that in ruling on another defendant's demurrer to the FAC, the court "advised plaintiffs to plead their claims as though this would be the last opportunity to amend."

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend

if there is a reasonable possibility that the defect can be cured by amendment."'" (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 970-971 (*Aubry*).) "If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Here, plaintiffs have demonstrated that they can allege more specific facts to support their negligence claim, and such an amendment could cure the purported defect. The court therefore abused its discretion by denying plaintiffs leave to amend. Although plaintiffs were allowed to amend their complaint following other defendants' demurrers, it does not follow that plaintiffs were afforded a fair opportunity to amend their causes of action as alleged against Title365. (See, e.g., *Aubry, supra,* 2 Cal.4th at p. 971 [where "leave to amend was granted for the sole purpose of permitting the [the plaintiff] to attempt to state a cause of action under Government Code section 815.6[,] [i]t does not appear . . . that the [plaintiff] had a fair opportunity to amend its complaint to state a cause of action under any other legal theory."].) The trial court's denial of leave to amend the allegations against Title365, after a single demurrer addressing those allegations for the first time, was an abuse of discretion. (See *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 ["leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment."].)

E. Breach of contract/breach of the duty of good faith and fair dealing

The trial court gave three reasons for sustaining the demurrer on plaintiffs' seventeenth cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing. First, the court said that plaintiffs "neither set out [the contract's] terms verbatim, nor have they alleged the legal effect, nor have they attached a copy to the pleading." Second, the court said that "[t]he facts pleaded also do not set forth a cause of action for breach of the implied covenant of good faith and fair dealing within CACI 325." Third, the court stated, "In addition, this appears to be a new claim, not present in the First Amended Complaint, which was added without permission."

Plaintiffs assert that their cause of action was adequately alleged. "To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) "In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199 (*Construction Protective*).)

Construction Protective involved insurance at a construction site where a fire broke out. CPS, the insured, sued TIG Insurance, the insurer, for breach of contract and breach of the implied covenant of good faith and fair dealing, asserting that TIG Insurance should have defended CPS for claims relating to the fire. In considering TIG Insurance's demurrer to CPS's complaint, the Supreme Court noted that CPS chose to plead the

legal effect of the contract rather than setting out the terms verbatim or attaching the contract to the complaint. The Court said, "[T]hough the complaint could have been clearer, it satisfactorily alleged (1) that the insurance policy obligated TIG Insurance to defend and indemnify CPS against suits seeking damages, and (2) that under the terms of the policy, [another party's] setoff claim fell within the scope of that contractual obligation. Whether CPS can prove these allegations (that is, whether its interpretation of the applicable contractual language is correct in light of what we have said here) remains to be seen, but the allegations are sufficient to establish a prima facie right to relief." (*Construction Protective, supra*, 29 Cal.4th at p. 199.)

Here, plaintiffs have also alleged sufficient facts to withstand a demurrer. Plaintiffs alleged that Title365 issued a preliminary title report, thereby offering to issue a title policy on the terms and conditions of the preliminary title report. The preliminary title report did not mention the Real Value loan or except it from coverage. Plaintiffs accepted this offer by purchasing the title policy. However, after escrow closed and the Real Value loan was recorded, Title365 issued a title policy to plaintiffs that excepted the Real Value loan from coverage. Plaintiffs alleged that "Title365 breached the contract by issuing a Title Policy which excepted the Real Value Loan from coverage."

The SAC therefore alleged sufficient facts to allege a breach of contract cause of action. Moreover, such a claim is cognizable in the title insurance context.[5] (See, e.g., *Lee, supra*, 188 Cal.App.4th 583, 599.)

---

[5] Title365 asserts several fact-based arguments, such as contending that plaintiffs alleged the wrong date for the

Plaintiffs also have alleged a cause of action for breach of the implied covenant of good faith and fair dealing. "[A] breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. [Citation.] There must be proof the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, 'but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.'" (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949.) Here, the seventeenth cause of action alone does not clearly allege that Title365 engaged in a conscious and deliberate act to frustrate the agreement. However, the allegations of the paragraphs incorporated into the seventeenth cause of action, which include the allegations of conspiracy and aiding and abetting fraud, offer ample facts to support this element. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 ["we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context."].)

The trial court also sustained the demurrer on the basis that the court did not approve the addition of this cause of action. The FAC did not include a breach of contract claim. The SAC included a breach of contract claim for the first time, alleged

---

preliminary title report, or that the preliminary title report plaintiffs attached to their opposition to the demurrer was a homeowner policy, and plaintiffs were lenders, not homeowners. The court denied Title365's request to judicially notice an alternate preliminary title report Title365 submitted in support of its arguments, and we do not make factual determinations in relation to a demurrer ruling.

against only Title365. Generally, "[f]ollowing an order sustaining a demurrer . . . with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. [Citation.] The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

However, plaintiffs point to the April 2017 stipulation they entered into with defendant Shelly Eshelman, which the trial court signed. The stipulation stated that the court had already sustained the demurrer to the FAC by defendant Preferred Escrow Services, Inc., and Eshelman had also filed a demurrer to the FAC. The stipulation stated that Eshelman and plaintiffs agreed that "Plaintiffs shall file a Second Amended Complaint, including *but not limited to* whatever claims they make against Eshelman." (Emphasis added.) On May 11, 2017, the trial court sustained Real Value's demurrer, and instructed plaintiffs to "plead [their claims] as if this [would be] the last opportunity to amend." Plaintiffs assert that these multiple orders from the court did not restrict plaintiffs' ability to add a new cause of action to the SAC.

In light of the multiple court orders, and the stipulation with Eshelman that plaintiffs' amendments were "not limited to" claims against Eshelman, we find that plaintiffs were not barred from asserting an additional cause of action. As discussed above, great liberality should be exercised in allowing a plaintiff leave to amend a complaint, and here the court's orders and stipulation did not clearly bar further amendment. As such, we find that the trial court erred in sustaining the demurrer to the seventeenth

cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing without leave to amend.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order sustaining Title365's demurrer without leave to amend. The court shall enter a new order overruling the demurrer as to the causes of action for conspiracy to commit fraud, aiding and abetting fraud, and breach of contract and breach of the implied covenant of good faith and fair dealing. The new order shall sustain the demurrer on plaintiffs' cause of action for negligence, and grant plaintiffs leave to amend that cause of action. Plaintiffs are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.